



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 24, 1995

Ms. Raenell Silcox
Attorney
Resource Protection Division
Texas Parks and Wildlife Department
4200 Smith School Road
Austin, Texas 78744

OR95-665

Dear Ms. Silcox:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 31849.

The Texas Parks and Wildlife Department (the "department") received a request for thirty-seven categories of documents related to the site of the former Hi-Yield Chemical Company in Commerce, Hunt County, Texas. You claim that portions of the requested information are excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. You have submitted representative samples of the requested documents.¹ We have considered the exceptions you claimed and have reviewed the sample documents.

Section 552.103(a) applies to information:

¹In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 588 (1991).

The Governor of Texas designated the department as one of the trustees for the state's natural resources pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601 *et seq.*, and the Clean Water Act, 33 U.S.C. § 1321(c). *See* 40 C.F.R. § 300.605² As a trustee, the department may bring a court action to recover natural resource damages sustained as the result of an unauthorized discharge of hazardous material. *See* Nat. Res. Code § 40.107. You inform us that a natural resource damage claim can only be resolved in one of two ways: settlement or litigation. You also inform us that the trustees have a claim for natural resource damages at the Hi-Yield site which they are currently investigating and evaluating. You assert that the submitted documents should be excepted from public disclosure because they contain "information that could compromise the trustees' position in settlement negotiations/litigation."

We believe that the requested information relates to settlement negotiations and/or reasonably anticipated litigation to which the department is or may be a party. We, therefore, conclude that the department may withhold the requested information based on section 552.103 of the Government Code, with the exception noted below.

You state that you believe that one of the submitted sample documents is public knowledge. If information has already been publicly disclosed, it may ordinarily not be withheld in the future. Open Records Decision Nos. 436 (1986), 435 (1986). Therefore, the department may not withhold based on section 552.103 any of the information that has been previously disclosed. You may withhold the remainder of the submitted information. We note that the applicability of section 552.103(a) ends once a settlement agreement is reached or the litigation is concluded. Attorney General Opinion MW-575

²The state trustees for natural resources also include the Texas Natural Resource Conservation Commission, and the Texas General Land Office.

(1982); Open Records Decision No. 350 (1982). We further note that section 552.103(a) protection ends when the opposing parties in anticipated litigation have seen or had access to requested information. Open Records Decision Nos. 597 (1991), 349 (1982).³

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee
Assistant Attorney General
Open Government Section

SES/KHG/rho

Ref.: ID# 31849

Enclosures: Submitted documents

cc: Ms. Cathryn G. Binz
Guida, Slavich & Flores
5949 Sherry Lane, Suite 1150
Dallas, Texas 75225
(w/o enclosures)

³Section 552.111 is waived by the release of the information to the public. See Open Records Decision No. 435 (1986). Therefore, section 552.111 also does not except from disclosure those documents that have been disclosed to the public. Additionally, although you claim in your original letter that sections 552.101 and 552.107 apply to except the sample information from disclosure, you do not explain how these sections apply to any specific information. The Government Code places on the custodian of records the burden of proving that records are excepted from public disclosure. Attorney General Opinion H-436 (1974). If a governmental body fails to claim an exception, the exception is ordinarily waived unless the information is deemed confidential under the act. See Attorney General Opinion JM-672 (1987). As you have not met your burden as to the application of section 552.107, we consider that exception waived. We also conclude that there is no confidential information or information protected by constitutional or common-law privacy in the submitted documents. Therefore, section 552.101 does not except the requested information from required public disclosure.